

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAVIER CHAVEZ-GARCIA,)	Case No.	C05-0183-JCC-MAT
)		(CR01-109-JCC)
Petitioner,)		
)		
v.)	REPORT AND RECOMMENDATION	
)		
UNITED STATES OF AMERICA,)		
)		
Respondent.)		

INTRODUCTION

Petitioner filed a motion under 28 U.S.C. § 2255 seeking to vacate, set aside, or correct his 2004 federal court sentence. (Dkt. 1.) Respondent opposed petitioner's motion. (Dkt. 9.) Petitioner did not submit a reply. Following careful review of the record, the Court concludes that petitioner's § 2255 motion should be denied.

BACKGROUND

On September 4, 2003, pursuant to a plea agreement with the government, petitioner pled guilty to one count of conspiracy to manufacture and distribute methamphetamine. (Dkt. 9, Ex. A.) Based upon various admissions of petitioner, the United States Probation Officer had determined his final, total offense score to be 39 and, with a criminal history category of I, the Federal Sentencing Guidelines ("USSG" or "Guidelines") range to be between 267 to 327 months. (Dkt. 10, Ex. B.) However, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C),

01 petitioner and the government stipulated to a sentencing range of 144 to 180 months of
02 incarceration. (Dkt. 9, Ex. A.) Petitioner also agreed in the plea agreement to waive certain rights
03 in exchange for a reduced sentence, including the right to collaterally attack that sentence, except
04 as related to the effectiveness of his legal representation. (*Id.*) On January 15, 2004, the Court
05 accepted the plea agreement and sentenced petitioner to 144 months imprisonment. (*Id.*, Ex. C.)

06 Petitioner did not file a direct appeal and his conviction became final ten days later. Fed.
07 R. App. P. 4. He timely filed the instant petition within a year of when his conviction became final.

08 DISCUSSION

09 In his § 2255 motion, petitioner asserts that his sentence was based on facts never proven
10 to a jury beyond a reasonable doubt, nor admitted by himself, in contravention of the holding in
11 *United States v. Booker*, 125 S.Ct. 738 (2005). He argues that *Booker* applies retroactively to his
12 sentencing and that he should be re-sentenced in accordance with that decision.

13 Respondent argues that the motion should be denied because *Booker* does not apply
14 retroactively to cases on collateral review. Respondent also argues that petitioner knowingly and
15 voluntarily waived his right to collaterally attack his sentence, that he procedurally defaulted on
16 his claim by failing to raise it either at sentencing or on direct appeal, and that, because it was
17 based on facts he admitted and was nearly ten years less than a sentence in the applicable
18 Guidelines range, petitioner's sentence was appropriate.

19 Retroactivity

20 On June 24, 2004, the United States Supreme Court issued its opinion in *Blakely v.*
21 *Washington*, 124 S.Ct. 2531 (2004). In *Blakely*, the Supreme Court addressed a provision of the
22 Washington Sentence Reform Act which permitted a judge to impose a sentence above the
23 statutory range upon finding, by a preponderance of the evidence, certain aggravating factors
24 which justified the departure. *Id.* at 2535. The trial court relied upon this provision to impose an
25 exceptional sentence which exceeded the top end of the standard range by 37 months. *Id.* The
26 Supreme Court held that this exceptional sentence violated the Sixth Amendment because the facts

01 supporting the exceptional sentence were neither admitted by petitioner nor found by a jury. The
02 Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence
03 a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the*
04 *defendant.*" *Id.* at 2537 (emphasis in original; citing *Apprendi v. New Jersey*, 530 U.S. 466, 490
05 (2000) ("Other than the fact of conviction, any fact that increases the penalty for a crime beyond
06 the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable
07 doubt."))

08 On January 12, 2005, the Supreme Court issued its ruling in *Booker*. In *Booker*, the
09 Supreme Court addressed *Blakely* in the context of the Federal Sentencing Guidelines and
10 concluded that the Sixth Amendment, as construed in *Blakely*, applies to the Guidelines. *Id.* at
11 745. The Supreme Court remedied the Sixth Amendment problem by excising the provision of
12 the Sentencing Reform Act which made the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus
13 rendering the Guidelines effectively advisory. *Booker*, 125 S.Ct. at 764-65.

14 The Ninth Circuit recently held that "*Booker* is not retroactive, and does not apply to cases
15 on collateral review where the conviction was final as of the date of *Booker's* publication." *United*
16 *States v. Cruz*, ___ F.3d ___, No. 03-35873, 2005 U.S. App. LEXIS 19901, at *4-6 (9th Cir.
17 Sept. 16, 2005). *Accord Never Misses a Shot v. United States*, 413 F.3d 781, 783-84 (8th Cir.
18 2005); *United States v. Bellamy*, 411 F.3d 1182, 1188 (10th Cir. 2005); *Lloyd v. United States*,
19 407 F.3d 608, 614-16 (3d Cir. 2005); *Guzman v. United States*, 404 F.3d 139, 143-44 (2d Cir.
20 2005); *Humphress v. United States*, 398 F.3d 855, 860-63 (6th Cir. 2005); *Varela v. United*
21 *States*, 400 F.3d 864, 867-68 (11th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 480-
22 81 (7th Cir. 2005). *See also Schardt v. Payne*, 414 F.3d 1025, 1038 (9th Cir. 2005) (finding
23 *Blakely* did not apply retroactively). In this case, petitioner's January 15, 2004 conviction was
24 unquestionably final as of the January 12, 2005 decision in *Booker*. Thus, the government
25 correctly asserts that petitioner may not rely on *Booker* in his § 2255 motion. Because the
26 retroactivity issue disposes of petitioner's claim, the Court need not address the government's

01 additional arguments.

02 CONCLUSION

03 For the reasons described above, petitioner's § 2255 motion must be denied. A proposed
04 order accompanies this Report and Recommendation.

05 DATED this 23rd day of September, 2005.

06 

07 Mary Alice Theiler
08 United States Magistrate Judge
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